



IN THE
Supreme Court of the United States

October Term, 1975

No. 75-1791

ARTHUR ANDERSEN & CO.,

Petitioner,

v.

MITCHELL A. KRAMER and DAVID C. HARRISON,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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— PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. —

The petitioner, Arthur Andersen & Co. ("Andersen"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 20, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, *infra*, pp. A1-A19. The two opinions of the District Court for the Eastern District of Pennsylvania, dated October 1, 1974 and April 17, 1975, appear in Appendix B, *infra*, pp. A20-A23 and Appendix C, *infra*, pp. A24-A32, respectively.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on April 20, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether refusal by the Court of Appeals to take jurisdiction of petitioner's appeal, on the theory that the collateral order doctrine is never applicable to any aspect of a class action determination, was error when the appeal presented a serious and unsettled question of professional impropriety by an attorney in his role as class representative.

2. Whether the District Court erred in concluding that an attorney was adequate to represent a class notwithstanding a flagrant record of professional impropriety in the commencement and prosecution of the suit, thus depriving petitioner of the certainty that a judgment on the merits in its favor would be *res judicata* as to the unnamed class members.

STATUTORY PROVISIONS AND RULES INVOLVED.

United States Code, 28 U. S. C. § 1291:

Final decisions of District Courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Federal Rules of Civil Procedure, Rule 23(a)(4):

Class Actions.

"(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

STATEMENT OF THE CASE.**A. Preliminary.**

This suit, a class action brought under the federal securities laws, was commenced by a Philadelphia lawyer, Mitchell Kramer, who named himself both as class representative and as counsel to the class. Because the underlying securities had been purchased jointly, Kramer also named his co-owner, David Harrison, as a party plaintiff. While Harrison assented to his role as a party plaintiff, he disclaimed any responsibility for prosecuting the suit as a class representative. For this reason, Harrison was treated by the Court of Appeals solely as a class member in its determination that Kramer was not qualified to act as class counsel because his interest as class counsel in recovering a potential award of counsel fees conflicted head-on with his interest as class representative in recovering only \$219.07 in alleged damages.

Although the Court of Appeals readily accepted jurisdiction over petitioner's appeal involving the challenge to Kramer's qualifications to act as class counsel because the issue involved "a serious question of impropriety", it refused to accept jurisdiction in respect of petitioner's companion appeal involving the challenge to Kramer's qualifications to act as class representative, even though the conduct and ethical considerations underlying the one appeal were precisely the same as those underlying the other.

B. Facts.**1. The Filing of a Strike Suit.**

On January 6, 1969, the two plaintiffs herein, Mitchell A. Kramer, Esquire, and David C. Harrison, Esquire, purchased as tenants in common 50 shares of the common stock of defendant Scientific Control Corp. ("Scientific").

The purchase was made with partnership funds, allegedly in reliance upon a company prospectus which had become effective on October 28, 1968 (Kramer 66a-67a; Harrison 98a, 108a-109a).¹ The stock was sold a month later, based upon Kramer's "personal 10% rule" that "if the stock dropped 10%, he [Kramer] would sell it automatically" (Marron 270a), and resulted in an aggregate net loss to the plaintiffs of \$438.13 (Kramer 80a).

Between February 1969, when Kramer and Harrison sold their stock, and July 1971, the month before the complaint herein was filed, there were no developments which bear on this case: Kramer and Harrison had no financial interest in Scientific, and had "no official information pro or con, bad or good, about Scientific Control during that period" (Kramer 82a).

In July 1971, Kramer received a four-page Questionnaire in blank from the SEC requesting information about the Scientific shares which had been registered in plaintiffs' names (Kramer 81a; Second Amended Complaint, Exhibit A, 45a-48a). By this time, the partnership of Kramer and Harrison had dissolved and Kramer was in practice as a "sole proprietor" with one salaried associate, Robert M. Britton, Esquire (Kramer 57a; Harrison 124a). Rather than filling out and returning the Questionnaire to the SEC, Kramer decided instead to file suit immediately and instructed his associate to go to the local business library to consult Moody's "cut sheet" for a list of persons who could be named as defendants (Britton 234a; Kramer 72a-73a). Without any further investigation and without reference to any documents other than the prospectus and the "cut sheet", Kramer then instructed Britton to file a com-

1. References are to the depositions taken herein by name of deponent and the page number in the Appendix filed by Andersen in the Court of Appeals.

plaint in Kramer's and Harrison's names² containing allegations of a "general nature" that the prospectus "failed to disclose material misstatements and all that sort of thing" (Britton 201a, 235a-238a).

2. The Creation of a Conflict of Interest by Kramer in Naming Himself as Class Representative and in Having the Sole Associate in His Office Appear as Class Counsel.

In his complaint, Kramer not only named himself as a party plaintiff, he also had himself named as representative of a class comprised of all purchasers of Scientific stock from October 31, 1968 to November 21, 1969 (15a-16a).³ Kramer did not name himself, however, as the attorney. Instead, he instructed Britton, his employee, to sign the complaint even though, at the time, Britton had been admitted to practice for scarcely a year and had had virtually no experience in securities litigation (Britton 244a). Kramer's reason, as it later developed, was to conceal (a) his conflicting interest as class counsel in a potential award of counsel fees far in excess of the \$219.07 he sought in damages and (b) his conflicting obligation to withdraw from the case as class counsel because of his duty as class representative to testify on behalf of the class.

The Court of Appeals did not address the questions of "whether Kramer was the de facto attorney" or "the

2. Harrison had been solicited by Kramer to appear as a party plaintiff because of their joint ownership in the underlying securities (Harrison 101a, 123a, 129a).

3. Although Harrison gave Kramer "permission" to "use my name as one of the class representatives", he made it abundantly clear to Kramer that he himself wanted nothing to do with the prosecution of the suit and disclaimed any responsibility for its conduct, including the selection of counsel and payment of expenses, thus effectively eliminating himself as a *bona fide* representative of the class (Harrison 101a, 105a-107a, 113a, 123a, 129a, 134a; Appendix A, *infra*, p. A13).

motivations of Kramer as a plaintiff, as a class representative, or as an attorney-employer or attorney-partner of the attorney who formally appeared for the plaintiffs". Instead, it held that an "appearance" of professional impropriety in violation of Canon 9 of the Code of Professional Responsibility had been created by virtue of the appointment by Kramer of the sole associate in his office as class counsel.⁴ Appendix A, *infra*, pp. A7, A14. The record makes it very clear, however, that Kramer was the *de facto* attorney in the case and that his efforts to create a false impression to the contrary involved him in an ever widening circle of deceit and professional impropriety.

3. Kramer's False Denials That He Was Ever the De Facto Attorney.

At his deposition, taken in January 1974, Kramer insisted that Britton, and later Kapustin, were and always had been the attorneys representing plaintiffs and the class—not himself. Thus (Kramer 74a):

"Q. Now, when Mr. Britton worked for you prior to the filing of this lawsuit, I take it he was under your general supervision and control as an employee-lawyer?

A. When he was working on my cases, or his cases, yes.

Q. That would likewise apply to this lawsuit?

A. No, it would not.

Q. Why is that?

A. Because we considered this his case as other cases that he brought into the office were.

4. When Britton left Kramer's employ on June 15, 1972, Kramer unilaterally discharged him as class counsel of record and replaced him with his (Kramer's) new associate, Stephen Kapustin (docket #52, 53 at 4a).

Q. Did he bring this case in?

A. No. He brought it in the sense that I as a plaintiff came to him as an attorney and asked him to handle the case."

Continuing (*id.*, at 75a):

"A. It was his case.

Q. What do you mean by 'his case'? Did he have a proprietary interest in it?

A. Yes, he handled the case. He was to get a fee, if there were any, on the case."

According to Kramer, Britton had agreed to represent him, and the class, in this protracted litigation with the understanding that he, Britton, would receive any counsel fees awarded by the Court (Kramer 61a-62a).

But the record, and particularly Britton's testimony, establishes to the contrary beyond any reasonable doubt: (1) that Kramer never told or even hinted to Britton that the case was his throughout the entire period that Britton worked on it (Britton 207a, 209a-210a, 218a-219a, 222a-226a, 256a); (2) that there was nothing in writing on the subject even though it was Kramer's practice to reduce contingent fee arrangements to writing (*id.*, at 251a-252a); (3) that, in his own mind, Britton was acting as Kramer's employee, not as his attorney, when Kramer instructed him to prepare the complaint (*id.*, at 253a-254a); (4) that at the time the complaint was filed Britton didn't have any knowledge about how fees were determined in class actions (*id.*, at 256a); (5) that Britton's actual expectation was that if the case was settled he might "be in for a raise or a bonus of some kind" (*id.*, at 257a); (6) that when Britton left Kramer's office and was supplanted on the case by Kramer's new associate, Stephen Kapustin, Britton understood fully that the case was Kramer's, not his (*id.*, at

193a-194a); (7) that Kramer's construct of his fee arrangement with Britton was conveyed to Britton for the first time on the very eve of Britton's deposition, almost two years after Britton had left Kramer's employ (*id.*, at 223a-224a, 258a-263a); (8) that costs related to the suit, such as the filing of the complaint, service costs, and Britton's trip to Washington, D. C., were all paid for by Kramer's law firm out of firm assets (*id.*, at 197a-199a); (9) that Kramer's firm paid "all the overhead", including Britton's and Kapustin's salaries and the salaries of their secretaries (*id.*, at 187a; Kramer 96a); (10) that the complaint was filed in a backer bearing the firm name of "Kramer, Harrison and Bernstein" (docket #1 at 2a); (11) that all other papers filed by plaintiffs in this suit to and including March 6, 1974, are with but one exception in backers bearing the firm name of "Mitchell A. Kramer" (docket # #2, 17, 30, 34, 46, 48-49, 52-55, 61, 63 82 & 105 at 2a-7a); (12) that the papers filed by plaintiffs from March 6, 1974 to date are all in backers bearing the firm name of "Kramer and Salus" (docket # #112-113, 121, 129, 133-134, 137-148, 151-164, 167, 170-171, 178-179, 183 & 196 at 7a-10a); (13) that Kramer's partner, Herbert A. Salus, Jr., has entered his appearance herein as counsel of record for plaintiffs (docket #162 at 8a); and (14) that all 49 letters addressed by plaintiffs to the Court and parties of record were written on stationary bearing Kramer's firm name (docket #202 at 10a).

The tempting news that Kramer had conveyed to Britton on the eve of Britton's deposition, that the case had been Britton's from its inception and during the entire period of his employment in Kramer's office and that Britton was therefore in line for an ultimate award of counsel fees, was nearly more than Britton could resist. Thus, with respect to the preparation of the original complaint, Britton at first was all braggadocio:

"I did what was necessary to get the complaint together. (189a)

" . . .

"I developed—the facts, as claimed in the Complaint (196a)

" . . .

" . . . I made the appropriate allegations in the Complaint regarding class actions. (216a)

" . . .

"I was handling the case entirely, I did everything on the case. (221a)

" . . .

"I prepared the whole thing." (236a)

During a short recess, however, Britton experienced a "queasy feeling" about the strictures of Rule 11 of the Federal Rules of Civil Procedure and the glaring discrepancy between the "good ground" it requires as a condition to the signing of a complaint and the absence of any factual basis to support the allegations of fraud in the original complaint, and, upon the resumption of his testimony, placed full responsibility for the preparation and filing of the original complaint squarely on Kramer's shoulders. Thus (*id.*, at 243a-244a):

"THE WITNESS: The first Complaint which was filed in the Summer of 1971, were conclusions that were made by Mitchell and were conveyed to me in my capacity as then-associate, and whatever you term it now, well, I mean, fine. But I was working for him at that time and he analyzed these things, I prepared the Complaint, but the Complaint was prepared in accordance with what I was told regarding the conclu-

sions of fraud after his analyzing these documents and me looking at them. It wasn't an independent decision to any extent on my part as to what conclusions these things led to. He analyzed these things, the prospectus and so forth, and asked me to file a Complaint. I was working as an associate and being paid on a weekly basis. He said, 'Let's file a Complaint,' and we filed—I don't want there to be—even any illusion to the possibility that I, independently, without proper justification—because I have a queasy feeling about this, came and filed a Complaint against your client or anybody else's client without very sufficient justification under Rule 11 or any other Rule. These conclusions were reached by Mitchell, who is an experienced attorney, who had experience in these areas, who analyzed these things, who came up with these conclusions that there was a fraud involved as a result of the bankruptcy, as a result of the prospectus, as a result of the Moody's information, and that these were the parties that were to be sued."

Continuing (*id.*, at 244a-245a):

"Finally, I acted as his attorney but under his guidance and direction. I just wanted to make that clear, that at the time the Complaint was filed, I had, for all practice [sic] purposes, six months' experience. The other six months—six months' experience with Mitchell. The other six months had nothing to do with this type of law and those conclusions were reached by Mitchell and those allegations were—the decisions regarding those allegations were reached by Mitchell in his capacity as an attorney. You can't separate the two. And the situation as it was back at that time was as you would picture it and I just don't want you or anybody else to have any misunderstanding regarding

that. He arrived at these—in all the analyzing of all these documents throughout the course of this thing, he helped me all along. I handled the preparing of the papers—but the nitty-gritty of the decisions regarding what was happening here, I obviously relied heavily on his experience in these particular things."

And finally (*id.*, at 245a-246a):

"The briefs and so forth I prepared entirely—almost entirely on my own although he may have read them over. The nitty-gritty as to what was wrong or what happened here was arrived at as a result of analyzing all of these documents which we've been talking about for the last couple of hours; and those decisions, unless I saw something in there, from my expertise, which was limited were arrived at to a large extent by Mitchell's expertise, which, from what he had told me, was unlimited.

"So I just wanted to clarify that, on the record, anything regarding Rule 11, I felt was justified because I was relying on somebody who had an unlimited amount of experience and concluded quite affirmatively that there was something improper and something missing or a misstatement from the financial statements, and records, and so forth and so on.

"Okay. Does that pretty much cover it?

"Mr. Kapustin: Oh, yes."

Kramer was simply at a loss to explain why, if Britton really was the attorney for the class as Kramer claimed, Kramer had refused to let the case out of his (Kramer's) office when Britton left (Kramer 87a-88a):

"Q. Well, it was Mr. Britton's case. Why isn't it still his case?

Mr. Kapustin: Objection.

A. Because he is no longer in our law firm.

Q. Why didn't you let him take it with him?

Mr. Kapustin: Objection.

Q. (Continued.) You had given it to him, hadn't you?

A. Yes.

Q. Well, why didn't you let him take it with him?

A. I preferred to have somebody in the office.

Q. Why?

A. I don't know why."

And further (*id.*, at 89a-90a):

"Q. You have already stated that you want to keep the case in the office. Why?

Mr. Kapustin: I think I will have to object to that also.

Q. (Continued.) Answer the question.

Mr. Kapustin: And I direct him not to answer.

Q. (Continued.) Do you refuse to answer this question?

A. Yes.

Q. Well, the fact is, you want to keep control of the case, don't you, Mr. Kramer?

Mr. Kapustin: Objection.

Q. (Continued.) Answer the question, sir.

Mr. Kapustin: I direct the witness not to answer.

Q. (Continued.) You refuse to answer the question?

A. Yes."

As to Kramer's claimed interest in maintaining this suit at any personal cost to himself for a maximum recovery of \$219.07 (Kramer 80a), Kramer testified: (1) that he had "no idea" what the cost of notice to the class might be (*id.*, at 64a); (2) that if the cost of notice should run to \$200,000 he would pay it (*id.*, at 65a); and (3) that he had never asked Harrison to pay "any portion" of the costs (*id.*, at 60a). But Kramer, as noted, was also at a total loss to explain why, upon receipt of the SEC questionnaire, he had failed to fill it out or to cooperate in any way with the SEC in its investigation (*id.*, at 68a-69a, 71a-73a, 84a-85a).

4. The District Court Rulings and Petitioner's Appeals to the Court of Appeals.

On October 1, 1974, the District Court certified the action as a class action (Appendix B, *infra*, pp. A20-A23). Because discovery on Kramer's adequacy as a class representative had not been completed and because that issue had not been briefed or argued, petitioner moved for a reconsideration (docket #172). The motion for reconsideration was denied on April 17, 1975 (Appendix C, *infra*, pp. A24-A32) and petitioner filed its notice of appeal on May 16, 1975 (180a).

On June 20, 1975, petitioner moved in the District Court to disqualify Kramer and his firm as class counsel (docket #197 at 10a). That motion was denied on June 30, 1975 (277a), and petitioner filed its notice of appeal from that decision on July 9, 1975 (337a).

Both of petitioner's appeals were prosecuted under 28 U. S. C. § 1291 on the ground that the decisions of the District Court certifying Kramer as class representative and qualifying him as class counsel were "final" decisions under the collateral order doctrine enunciated by this

Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and applied by this Court to class determinations in *Eisen v. Carlisle & Jacquelin* ("Eisen IV"), 417 U. S. 156 (1974). Because of the close interrelationship between the issues presented on the merits, petitioner's two appeals were consolidated by the Court of Appeals for purposes of briefing and argument.

5. The Decision of the Court of Appeals.

In its opinion, the Third Circuit recognized that the class certification issue was closely "related" to the disqualification-of-class-counsel issue (Appendix A, *infra*, p. A6), in fact so closely related that had Andersen "won on that [the class certification] score . . . the disqualification [of class counsel] issue might never have surfaced" (*id.*, at A15). While the Third Circuit held that the disqualification-of-class-counsel issue was ripe for review under the collateral order doctrine because it was "too important to be denied review" (*id.*, at A5), and because it presented "a serious question of impropriety" (*id.*, at A5), the Court simply brushed aside the class certification issue on the basis of its rigid, and we submit, inconsistent position that no aspect of a class determination is ever appealable under the collateral order doctrine. Such decisions, the Court noted, may be appealed only if first certified for interlocutory review by the District Court pursuant to 28 U. S. C. § 1292(b), and only if the District Court's certification is thereafter found acceptable to the Court of Appeals. Thus (*id.*, at A4):

"As we recently stated: '[T]his court has taken a strong position that a class certification decision, per se, is not an appealable final order under 28 U. S. C. § 1291. *Hackett v. General Host Corp.*, 455 F. 2d 618

(3d Cir.), *cert. denied*, 407 U. S. 925 (1972). To qualify for interlocutory review in this circuit a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.) (in banc), *cert. denied*, 419 U. S. 885 (1974).⁷ *Ungar v. Dunkin' Donuts of America, Inc.*, — F. 2d —, Nos. 75-1625/6 (3d Cir., Mar. 3, 1976). We will review class action certification decisions if the parties satisfy two conditions precedent, neither of which may be expected absent special circumstances—an order by the district court judge and permission from this court. 28 U. S. C. § 1292(b). See generally Note, *Interlocutory Appeals in the Federal Courts Under 28 U. S. C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975). Here, appellant met neither of the conditions. Accordingly, we will grant appellees' motion to dismiss the appeal at No. 75-1673."

Continuing (*id.*, at A5-A6):

"The appeal at No. 75-1849 stands on a different footing. Where a serious question of impropriety arises in the context of a motion to disqualify an attorney from proceeding to trial, this court has invoked the collateral rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Accordingly, we have held that district court orders denying such motions may be appealable under 28 U. S. C. § 1291. *Kroungold v. Triester*, 521 F. 2d 763, 765 (3d Cir. 1975); *American Roller Co. v. Budinger*, 513 F. 2d 982, 983 (3d Cir. 1975); *Greene v. Singer Co.*, 509 F. 2d 750 (3d Cir. 1971) (sur motion to dismiss appeal). We believe that the questions presented in the appeal at No. 75-1849 are "too important to be de-

nied review' and too 'independent of the cause' itself to require that appellate consideration be deferred". *Ibid.* at 751. We hold, therefore, that the order denying the motion to disqualify plaintiffs' counsel qualifies for immediate review." (Footnote omitted).

Turning to the merits of the appeal on the disqualification-of-class-counsel issue, the Court held that since an appearance of professional impropriety had been created when Kramer named himself as class representative and appointed his only associate as class counsel, it need not concern itself with whether any substantive impropriety had occurred (*id.*, at 7). In doing so, the Court declined to review, either in the context of Kramer's qualification to act as class counsel or, and more to the point in respect of the instant petition, his adequacy to act as class representative, any of the following questions of professional impropriety:

(1) Whether Kramer, as the *de facto* attorney, filed a complaint in federal court without good ground in violation of Rule 11 of the Federal Rules of Civil Procedure and DR7-102(A);

(2) Whether the suit was filed by Kramer as a strike suit for the purpose of obtaining counsel fees in violation of EC 7-4 and DR7-102(A)(2). Compare *Blue Chip Stamps, et al. v. Manor Drug Stores*, 421 U. S. 723, 740-743 (1975);

(3) Whether in naming himself as class representative and appointing himself as *de facto* class counsel, Kramer solicited employment from the unnamed members of the class in violation of Canon 2 generally, EC 2-4 and EC 2-8. Compare *Graybeal v. American Savings & Loan Association*, 59 F. R. D. 7, 14 (D. D. C. 1973); *Cotchett v. Avis Rent A Car*

System, Inc., 56 F. R. D. 549, 554 (S. D. N. Y. 1972); *Shields v. First National Bank of Arizona*, 56 F. R. D. 442, 444, (D. Ariz. 1971); *Shields v. Valley National Bank of Arizona*, 56 F. R. D. 448, 450 (D. Ariz. 1971);

(4) Whether Kramer solicited employment from Harrison after contacting him for the purpose of obtaining his joinder in a class action in violation of DR2-104(A)(5);

(5) Whether in maintaining this suit with firm funds, firm personnel and firm facilities, Kramer violated EC 5-8 and DR5-103(B). Compare *Bogus v. American Speech & Hearing Association*, — F. Supp. —, (Civ. No. 74-849, E. D. Pa., August 7, 1975);

(6) Whether in refusing to withdraw as class counsel after he had sworn under oath that he would testify as a witness on behalf of the class, Kramer violated DR5-101(B)(1)-(4) and DR5-102(A). Compare *Draganescu v. First National Bank of Hollywood*, 502 F. 2d 550 (5th Cir. 1974), *cert. denied*, 421 U. S. 929 (1975); *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F. 2d 555 (2d Cir. 1956), *cert. denied*, 355 U. S. 824 (1957); *Kruger v. European Health Spa, Inc. of Milwaukee, Wis.*, 56 F. R. D. 104, 105-6 (E. D. Wis. 1972);

(7) Whether in requiring an untrained and inexperienced lawyer to appear as counsel of record in a complex class action brought under the federal securities laws against 29 defendants, Kramer violated EC 1-2, DR2-103(A) and Canon 6 generally;

(8) Whether in denying under oath that he had ever acted as attorney *de facto*, and affirming under oath that he, as client, and Britton, as attorney, had reached a fee agreement at the outset of the case,

Kramer committed perjury or otherwise violated DR7-102(A)(5) and EC 8-5;

(9) Whether in having Kapustin convey to Britton on the eve of Britton's deposition a false account of the relationship that allegedly existed between Kramer and Britton while Britton was counsel of record, Kramer violated DR7-102(A)(7)-(8); and

(10) Whether in requiring counsel of record to communicate with the Court on stationery, and to file pleadings, all bearing his firm name, Kramer violated DR2-102(B)-(C).

REASONS FOR GRANTING THE WRIT.

I.

The Basis on Which the Court of Appeals Declined to Entertain Jurisdiction Over Petitioner's Appeal Is Contrary to This Court's Holding in *Cohen*, as Applied in *Eisen IV*, and Is in Conflict With Rulings of Other Circuits.

As noted, the Court of Appeals for the Third Circuit has adopted a mechanical rule of law which bars *any* early appeal involving *any* aspect of a class determination unless first certified by the District pursuant to 28 U. S. C. 1292(b) as an interlocutory order qualifying for immediate appeal and thereafter found acceptable for review by the Court of Appeals.

The Third Circuit's refusal to engage in an analysis of whether a class action decision can *ever* be a final collateral order appealable under § 1291 was in error. In *Eisen IV*, *supra*, at 169-172, this Court, after painstaking analysis, specifically concluded that the collateral order doctrine could and should be applied to class action rulings in order to determine whether those decisions are immediately appealable under § 1291. Thus (*id.*, at 169-170):

"At the outset we must decide whether the Court of Appeals in *Eisen III* had jurisdiction to review the District Court's *orders permitting the suit to proceed as a class action* and allocating the cost of notice. Petitioner contends that it did not. Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the *orders* in question constituted a 'final' decision within the meaning of 28 U. S. C. § 1291 and were therefore appealable as of right under that section *Because we agree with*

the first ground asserted by respondents, we have no occasion to consider the second." (Emphasis added; footnote omitted).

Continuing (*id.*, at 172):

"Like the order in *Cohen*, the District Court's judgment on the allocation of notice costs was 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' *id.*, at 546-547, and it was similarly appealable as a 'final decision' under § 1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action." (Footnote omitted).

The Third Circuit's dogged adherence to its ruling in *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir. 1972), *cert. denied*, 407 U. S. 925 (1972), which predated *Eisen IV*, simply rejects this Court's clear ruling in the latter case. Not every class action ruling by a district court will be immediately appealable under *Cohen*, but at least the Circuit Courts are required to apply the *Cohen* test in order to determine whether the decision is then appealable.

Despite *Eisen IV*, a clear split has developed among the Circuit Courts on the question of whether they are required to subject early appeals of class action decisions to the *Cohen* analysis. The Second and Eighth Circuits have taken the position that class action determinations appealed prior to final judgment must be exposed on an *ad hoc* basis to the *Cohen* standards when deciding whether

appellate jurisdiction exists. See *In Re Master Key Antitrust Litigation*, 528 F. 2d 5, 9-13 (2d Cir. 1975);⁵ and *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F. 2d 213 (8th Cir. 1975), *cert. denied sub. nom. Cessna Aircraft v. White Industries*, 44 U. S. L. W. 3282 (Nov. 11, 1975). See also Judge Rosenn's concurring opinion herein (Appendix A, *infra*, p. A19), wherein he eschews an absolutist position by noting that a class certification order will not "usually" meet the *Cohen* test. By necessary implication, however, he is prepared to evaluate each such appeal in the light of *Cohen*.

On the other hand, the Third, Seventh and Ninth Circuits have absolutely refused to apply the collateral order doctrine when the appeal before them involves any aspect of a class action certification. See Appendix A, *infra*, and cases cited therein; *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973) (*per curiam*); and *Blackie v. Barrack*, 524 F. 2d 891 (9th Cir. 1975), petition for cert. filed (44 U. S. L. W. 3518).⁶

5. In *Master Key* the Second Circuit described its approach as follows (*id.*, at 10):

"We have not chosen to adopt a strict rule denying appealability for class action certification orders in all cases [citation omitted], recognizing that there may be 'exceptional circumstances' under which interlocutory review of such orders may be appropriate. (Footnote omitted.)

6. The Second Circuit noted this split between the circuit courts in *Master Key* as follows (*id.*, at 10, n. 8):

"8. We note in passing that at least three circuits have taken the view that class action certification orders can never be appealable as 'final orders' under 28 U. S. C. § 1291. See *Blackie v. Barrack*, 524 F. 2d 891 (9th Cir. 1975); *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973) (*per curiam*); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925, 92 S. Ct. 2460, 32 L. Ed. 2d 812 (1972). See also *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F. 2d 314 (8th Cir. 1975). This is the view recommended for our circuit by Judge Friendly in his concurrence in *Parkinson v. April Industries, Inc.*, 520 F. 2d 650, 659-60 (2d Cir. 1975). The Ninth Circuit,

The recent decisions of the Tenth Circuit emphasize the need for a clear statement on this issue, for they flirt with both approaches, but do not conclusively establish which one they will follow. Compare *Hellerstein v. Mr. Steak, Inc.*, 531 F. 2d 470 (10th Cir. 1976), with *Seiffer v. Topsy's International*, 520 F. 2d 795 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 779 (1976).

The folly of the Third Circuit's wooden rule that the collateral order doctrine must not be applied to the District Court's class action decision in this case is revealed by the appellate court's expressed willingness to apply the very same doctrine to the very same facts when presented in the form of a motion to disqualify counsel.⁷ *Eisen IV* specifically instructs all appellate courts that class action decisions are not immune from analysis under the collateral order doctrine, and it follows that the Third Circuit's decision to exalt its pre-*Eisen IV* ruling in *Hackett* over the ruling in *Eisen IV* involves an erroneous application of law and should be reversed.

6. (Cont'd.)

in *Blackie v. Barrack*, *supra*, reasoned that the exceptional circumstances which justify review of a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), cannot be present in cases challenging class action certifications because effective review of the claim of improper certification can be had at the conclusion of the trial."

7. An even more bizarre result was reached by the Fifth Circuit in *Glenn v. Arkansas Best Corporation, et al.*, 525 F. 2d 1216 (1975) where the Court sidestepped its earlier rulings that disqualification-of-counsel issues are immediately appealable (See, e.g., *Draganescu v. First National Bank of Hollywood*, *supra*, and *Uniweld Products, Inc. v. Union Carbide Corporation*, 385 F. 2d 992 (5th Cir. 1967), *cert. denied*, 390 U. S. 921 (1968)) and refused to entertain an appeal from the qualification of plaintiff, Glenn, as class counsel on the ground that the issue "was intrinsically the same as the challenge of Glenn as a representative of the Class under Rule 23" (*id.*, at 1217). The effect of this ruling makes the appealability of the denial of a motion to disqualify counsel turn upon the untenable distinction whether or not counsel purports to represent a class.

II.

The District Court's Decision Allowing Kramer to Proceed as Class Representative Is a Final Collateral Order Presently Appealable Under 28 U. S. C. § 1291 and Involves Ethical Considerations Which Require Exposition by This Court.

Andersen asserted before the Third Circuit that the District Court's determination that Kramer could proceed in this litigation as class representative was a final decision under 28 U. S. C. § 1291, and was therefore immediately appealable. The decisions of this Court on the issue of appealability under § 1291 establish that there are three questions to be answered in ascertaining whether a particular order constitutes a "final decision". They are: (1) whether the decision is final in the sense that it is not "tentative, informal or incomplete"; (2) whether the decision involves a collateral issue in the sense that it is separable from the "merits" of the claims upon which relief is sought; and (3) whether the issues presented for review are "serious and unsettled" questions, "too important" to be denied review. As this Court summed it up in *Cohen* (*supra*, at 546):

"This decision appears to fall in that small class which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction".

That the decision of the District Court qualifying Kramer as class representative is neither tentative nor an ingredient of plaintiffs' cause seem too apparent to require

extended discussion. Since the District Court twice considered and twice upheld Kramer's role as class representative, its decision cannot be considered tentative, informal or incomplete.⁸ Nor can it seriously be argued that a determination regarding Kramer's ability to represent the class has any effect upon the resolution of plaintiffs' Securities Acts claims against the defendants. The ruling in this regard is plainly no different than the order permitting Kramer to act as class counsel—an order consistently recognized to be collateral to the merits of the case. See Appendix A, *infra*, and cases cited therein.

The real focus here is upon the seriousness and importance of the issue presented for review and upon a weighing of the disadvantages of denying justice by delay against the disadvantages of piecemeal review.

1. The Seriousness of the Issue Presented for Review.

The starting point is, of course, the Third Circuit's explicit and emphatic recognition, as noted above, of the seriousness of the issue presented by Kramer's conduct. That seriousness stems from the fact that it involves the ethics of the bar, the interpretation and administration of those ethics by the judiciary, and the importance that such ethics have to the general public. Of crucial importance in this regard is the circumstance that Kramer, first and foremost, is an attorney and officer of the court. It makes no difference that the issue involves Kramer's role as class representative as opposed to his role as class counsel. As Kramer's associate, Britton, astutely observed, "You can't separate the two". Formal Opinion 336 of the American Bar Association's Standing Committee on Ethics and Professional Responsibility states:

8. The fact that the District Court's order was made in the context of a Rule 23 determination, which is subject to possible modification, does not require a different conclusion in this case any more than it did in *Eisen IV*.

"In regulating a lawyer's nonprofessional as well as professional conduct, the Code of Professional Responsibility charted no new course. It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental, or public official. . . .

As stated in E. C. 1-2, the 'public should be protected from those who are not qualified to be lawyers by reason of a deficiency in . . . moral standards.' It would be utterly incongruous with the entire tenor of the code to find that its provisions regarding lawyers who engage in fraud, deceit, misrepresentation . . . do not apply to them when they are acting as individuals or as public servants." (Emphasis added).

Accord: *Suffolk Roadways, Inc. v. Minuse*, 287 N. Y. S. 2d 965, 970 (1968); *60 Columbia St. v. Leofreed Realty Corp.*, 110 N. Y. S. 2d 417 (Sup. Ct., N. Y. Co. 1952), *aff'd. per curiam*, 120 N. Y. S. 2d 295 (App. Div. 1953).

The record below presents a dramatic albeit sorry illustration of the ethical complications and difficulties which must inevitably arise when a practicing attorney brings a lawsuit on his own, naming himself on the one hand as representative of a class of potentially thousands of unnamed plaintiffs, and appointing himself on the other hand as legal counsel to the entire plaintiff class without having ever met or spoken to one of them. We submit that the inevitable potential for such complications, and the concomitant public distrust of lawyers that such potential engenders, dictate adoption of an uncompromising rule of law forbidding the practice without qualification. It is submitted further that an outspoken opinion at the highest appellate level swiftly and resolutely announcing

such a standard would have particular relevance in the present climate of disrespect for lawyers and indeed for the judicial system as a whole.⁹

The importance of the issue is further underscored by the circumstance that in refusing to review Kramer's qualifications to act as a class representative concomitantly with its review of his qualifications to act as class counsel, the Court of Appeals effectively deprived itself of the opportunity to consider the appropriate remedy to be applied to Kramer's conduct when viewed as a whole. Disqualification of Kramer as counsel is an inadequate cure for his misconduct, as it leaves undecided the crucial question of whether such misconduct has disqualified him to represent the class which has been certified. The overwhelming weight of authority among the district courts supports the view that the more appropriate cure in the case of a plaintiff who files a complaint naming himself as class representative and class counsel is to refuse him class certification. See, e.g., *Kruger v. European Health Spa, Inc. of Milwaukee, Wis.*, *supra*; *Shields v. First National Bank of Arizona*, *supra*; *Cotchett v. Avis Rent A Car System, Inc.*, *supra*; and *Graybeal v. American Savings & Loan Association*, *supra*. Accord: *Turoff v. The May Company*, — F. 2d — (No. 75-1697) (6th Cir. 3/16/76). The underlying rationale of these decisions is that class actions should not be permitted to proceed when instituted by an attorney for improper and self-serving purposes. This remedy, rather than the mere disqualification of counsel, prevents the creation of onerous class litigation where none previously existed and reestablishes the *status quo* without prejudicing anyone's interests. See *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974). The

9. See, e.g., Carrington, *The Ethical Crises of American Lawyers*, 36 Univ. of Pittsburgh Law Rev. 35 (Fall 1974).

Ninth Circuit articulated this rationale in *In re Hotel Telephone Charges*, 500 F. 2d 86, 91 (1974) as follows:

" In view of the nonexistent, or miniscule recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves. Considering that this action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not the individuals whose potential claims in any event are *de minimis* we find the Court's conclusion in *Berley v. Dreyfus Co.*, 43 F. R. D. 397, 398 (S. D. N. Y. 1967) applicable here:

' . . . we think that paragraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference-settling machinery. One method of achieving such economy is to avoid creating lawsuits where none previously existed. This is in part why "the extent and nature of any litigation . . . already commenced" is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason.' " (footnotes omitted).

It would serve no useful purpose to catalogue each respect in which the Code of Professional Responsibility has been violated in this case. Any one of them is more than sufficient to require the disqualification of plaintiffs as class representatives herein.

As stated in *Stavrides v. Mellon National Bank & Trust Company*, 60 F. R. D. 634, 636-7 (W. D. Pa. 1973):

"The issue then becomes whether questions which seek to establish unethical conduct by plaintiffs' coun-

sel are relevant to the question of whether the class should be declared. Put another way, if defense counsel do discover unethical conduct can that that fact properly be used as a basis for an argument seeking denial of class action status?

"Although the cases on this subject are not legion, it is apparent that unethical conduct by plaintiffs' counsel may result in a denial of the class action motion. *Korn v. Franchard Corp.*, C. C. H. Fed. Sec. Law Repr. ¶ 92,845 (S. D. N. Y. 1970). *Taub v. Glickman*, 14 F. R. Serv. 2d 847 (S. D. N. Y. 1970); *Simon v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 16 F. R. Serv. 2d 1021 (N. D. Tex. 1972).

"These cases stand for the proposition that class action status should be denied where counsel's unethical conduct has been or is prejudicial to the interests of the class, or results in creating a conflict of interest between the attorney and the class and the attorney is, therefore, obviously unable to protect the interests of the class."

Continuing (*id.*, at 637):

"We think that these cases are correct and that it is proper for courts to consider the ethical conduct of plaintiffs' counsel in deciding whether to certify a class. As the Third Circuit pointed out in *Greenfield v. Villager Industries, Inc.*, 483 F. 2d 824 (3rd Cir., filed June 21, 1973) there is a unique relationship between the plaintiffs' counsel and the members of the class:

' . . . in addition to the normal obligations of an officer of the court, and as counsel to parties to

the litigation, class action counsel possess, in a very real sense, fiduciary obligation to those not before the court."

And finally (*ibid*):

"In assessing the ability of the plaintiffs' counsel to carry out his fiduciary duties to absent class members we think the court should use its 'broad administrative, as well as adjudicative power' as 'guardian of the rights of the absentees' to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them."

To require a lawyer to have a client before commencing class action litigation cannot have any adverse impact upon the public's ability to right wrongs. It will, however, have a deleterious impact on counsel's ability to commence such litigation, *sua sponte*, in the hope of generating large counsel fees for himself. If the class action device is available to an attorney without the restraining influence of a class representative whose individual interests are limited to a recovery of his own damages, it becomes an almost irresistible instrument for vexatious litigation because the lawyer, unlike the layman, is fully initiated into the power that the mere commencement of such a suit has to produce settlement without regard to the merits.

As Justice Rehnquist recently had occasion to observe in *Blue Chip Stamps, et al v. Manor Drug Stores, supra*, at 740:

" . . . [I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved

against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit."

Continuing (*id.*, at 741):

"The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit."

And finally (*id.*, at 742-743):

"Obviously there is no general legal principle that courts in fashioning substantive law should do so in a manner which makes it easier, rather than more difficult, for a defendant to obtain a summary judgment. But in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legi-

itimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proven so before trial, such a factor is not to be totally dismissed."

2. The Disadvantages of Denying Justice by Delay.

Permitting an attorney to act as class representative although he has engaged in unethical behavior by, *inter alia*, stirring up litigation, amounts to a judicial *imprimatur* upon that conduct which is readily perceptible to not only all of the other class members but to the general public. If it is improper for an attorney to do what Mr. Kramer did in this case—and Andersen strenuously contends that it is—an appellate court statement outlawing such conduct several years hence will not eradicate the unfavorable impression drawn by the class members and the public in the intervening years. In other words, the District Court's approval, and the Circuit Court's apparent approval, of Mr. Kramer's conduct spreads wider and deeper as each day passes, for as Chief Justice Burger had occasion to observe in an address to the American Law Institute (52 F. R. D. 211, 215):

"When a lawyer flouts the standards of professional conduct once, his conduct will be echoed in multiples for years to come and long after he leaves the scene."

Moreover, it is clear that there exists a real possibility that Andersen will suffer irremedial harm if Mr. Kramer is not removed from the role as representative plaintiff in this matter. The question is whether a final judgment rendered in this case with Mr. Kramer as class representative would

be entitled to *res judicata* effect in other courts in the future. In other words, if Andersen is successful on the merits of this case and has judgment entered for it and against the class of plaintiffs, would it still be possible for a dissatisfied class member to challenge the validity of that judgment against him on the ground that he had not been adequately represented in the proceeding? If that person were not adequately represented, it would be a denial of his due process rights to bind him by the resultant judgment. *Hansbury v. Lee*, 311 U. S. 32 (1942).

In *Gonzales v. Cassidy*, 474 F. 2d 67, 74 (5th Cir. 1973) the appellate court addressed this issue with the following comment:

"As a general rule though, a judgment in a class action will bind the absent members of the class. The exception to this general rule is grounded in due process. Due process of law would be violated for the judgment in a class suit to be *res judicata* to the absent members of a class unless the court applying *res judicata* can conclude that the class was adequately represented in the first suit. *Hansberry v. Lee*, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1942). See *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 691, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961); *Dierks v. Thompson*, 414 F. 2d 453 (1st Cir. 1969); *Eisen v. Carlisle and Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968); *Mersay v. First Rep. Corp. of America*, 43 F. R. D. 465 (S. D. N. Y. 1968)." (Footnote omitted).

Cf., *Sagers v. Yellow Freight Systems, Inc.*, 68 F. R. D. 686, 689 (N. D. Ga. 1975). See also *The Importance of Being Adequate: Due Process Requirements In Class Actions Under Federal Rule 23*, 123 University of Pennsylvania Law Review 1217 (May, 1975). As the Second Circuit

Court of Appeals noted in *Bersch v. Drexel Firestone, Incorporated*, 519 F. 2d 974, 996 (1975), *cert. denied*, 96 S. Ct. 453 (1975):

"... [I]f defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."

In sharp contrast to the serious harm which will occur if prompt appellate review is denied in this case, there can be no disadvantages of substance in permitting the immediate appellate consideration of the limited questions presented here. Petitioner's appeal, as noted, does not involve the appealability of class determinations as such, but rather one particular aspect of such a determination which, when addressed and settled with appropriate guidance from this Court, is never likely to surface again.

CONCLUSION.

The issue presented herein should have been subjected to a *Cohen* analysis by the Third Circuit, and if it had been the matter would have been found to be immediately appealable under § 1291, for the issue is a crucial one which cannot be fully rectified by reversal after final judgment. Thus, the damage involved if review is deferred far outweighs the one-time impact this case will have on the appellate courts if a prophylactic rule barring such conduct is established by this Court.

June 10, 1976.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1673 and 75-1849

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP.; ARTHUR ANDERSEN & CO.; H. L. FEDERMAN & CO.; W. C. BAKER; W. D. RAY; J. J. BONNESS; L. J. RATNER; NELSON McKINNEY; R. D. FREEDMAN; HAM SWYTER; R. T. GOWAN; D. A. W. YOUNG; I. C. DEAL and E. E. SPECKS; KLEINER, BELL AND CO., INC.; JOHN B. BAIRD; DONALD G. O'NEAL; NORMAN C. YOUNG; CLYDE WILLIAMS; VAN CALVIN ELLIS; H. L. FEDERMAN; PATRICK S. MARTIN; WILLIAM C. WEATHERFORD; HENRY W. HOOKER; MERRILL J. WHISTON; ARTHUR E. SPECKHARD; WILLIAM C. LEE; JOSEPH T. JONES and GEORGE JAGGERS

ARTHUR ANDERSEN & CO., *Appellant* in
Nos. 75-1673 and 75-1849

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-1954)

(A1)

Argued February 11, 1976

Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges*.

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Opinion of the Court

(Filed April 20, 1976)

ALDISERT, *Circuit Judge*.

May a member of the bar who is a plaintiff class representative in a class action proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure designate as his counsel a member or employee of his law firm?

This is the question presented in the appeal at No. 75-1849 from an order denying appellant's motion to disqualify plaintiffs' counsel. Also raised, at No. 75-1673, is the issue whether the district court erred in certifying the class. F. R. Civ. P. 23(a), (c). We answer the first question in the negative; we do not reach the second, for want of an appealable order.

Mitchell A. Kramer and David C. Harrison, then law partners, purchased as joint tenants 50 shares of Scientific Control Corp. stock on January 6, 1969. They sold the stock one month later at a net loss of \$438.13. During the summer of 1971, after Kramer and Harrison had dissolved their partnership, Kramer received a four-page questionnaire from the Securities and Exchange Commission requesting information on the transaction in Scientific Control stock. Kramer did not answer the SEC inquiry. Instead, after communicating with Harrison and receiving his permission, Kramer filed suit,¹ naming himself and Harrison as plaintiffs. The complaint named as defendants Scientific Control Corp. and certain officers and directors; H. L. Federman & Co., an underwriting firm; and Arthur Andersen & Co., the certified public accounting firm and appellant herein. Robert M. Britton, then an associate in Kramer's office, signed the complaint. Britton later moved to dismiss as to several named defendants, to add several defendants, and to amend the complaint; still later, he moved for a class action determination. Shortly before Britton left the employ of Kramer in July 1972, he withdrew as counsel and Steven Kapustin, then

1. The complaint as amended alleged claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the regulations thereunder, as well as common law claims predicated on pendent jurisdiction. See *Kramer v. Scientific Control Corp.*, 365 F. Supp. 780 (E. D. Pa. 1973) (district court opinion denying motions to dismiss).

replacing Britton as an associate but now a partner of Kramer, entered his appearance.

On October 1, 1974, the district court granted plaintiffs' deferred motion for a determination that the action proceed as a Rule 23(b)(3) class action. 64 F. R. D. 558 (E. D. Pa. 1974). On April 17, 1975, the district court denied a motion for reconsideration of its class action certification or, in the alternative, for a certification pursuant to 28 U. S. C. § 1292(b). 67 F. R. D. 98 (E. D. Pa. 1975). The appeal at No. 75-1673 followed; appellees have moved to dismiss this appeal for want of jurisdiction.

Two months later, on June 20, 1975, appellant moved the district court, *inter alia*, to disqualify plaintiffs' counsel because "[t]here exists an irreconcilable conflict of interest between the representation by Kramer & Salus [the firm in which Kapustin is now a partner] of the named plaintiffs and the members of the class purported to be represented by the named plaintiffs; 2. The Code of Professional Responsibility bars such representation" Appendix at 272a. The district court, treating the motion as one for reargument or reconsideration of its April 17th order and, as such, untimely, denied the motion. *Ibid.* at 277a. Appellant then noticed the appeal at No. 75-1849.

I.

As we recently stated: "[T]his court has taken a strong position that a class certification decision, per se, is not an appealable final order under 28 U. S. C. § 1291. *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925 (1972). To qualify for interlocutory review in this circuit a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.) (in banc), *cert. denied*, 419 U. S. 885 (1974)." *Ungar v. Dunkin' Donuts of America, Inc.*, — F.

2d —, —, Nos. 75-1625/6 (3d Cir., Mar. 3, 1976). We will review class action certification decisions if the parties satisfy two conditions precedent, neither of which may be expected absent special circumstances—an order by the district court judge and permission from this court. 28 U. S. C. § 1292(b). See generally Note, *Interlocutory Appeals in the Federal Courts Under 28 U. S. C. § 1292(b)*, 88 HARV. L. REV. 607 (1975). Here, appellant met neither of the conditions. Accordingly, we will grant appellees' motion to dismiss the appeal at No. 75-1673.

The appeal at No. 75-1849 stands on a different footing. Where a serious question of impropriety arises in the context of a motion to disqualify an attorney from proceeding to trial, this court has invoked the collateral rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Accordingly, we have held that district court orders denying such motions may be appealable under 28 U. S. C. § 1291. *Kroungold v. Triester*, 521 F. 2d 763, 765 (3d Cir. 1975); *American Roller Co. v. Budinger*, 513 F. 2d 982, 983 (3d Cir. 1975); *Greene v. Singer Co.* 509 F. 2d 750 (3d Cir. 1971) (sur motion to dismiss appeal).² We believe that the questions presented in the appeal at No. 75-1849 are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred". *Ibid.* at 751. We hold, there-

2. We do not hold that every ruling relating to conflict of interest by an attorney should activate the *Cohen* rule.³

3. "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept [a contrary] view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters." *Borden Co. v. Sylk*, 410 F. 2d 843, 846 (3d Cir. 1969).

Greene v. Singer Co., *supra*, 509 F. 2d at 751.

fore, that the order denying the motion to disqualify plaintiffs' counsel qualifies for immediate review.

II.

Having established our appellate jurisdiction to review the denial of the motion to disqualify, we now properly turn to the question of the scope of our appellate review. It has been said that a district court's decision to grant or deny such a motion may be reversed only for an abuse of discretion. See *Kroungold v. Triester*, *supra*, 521 F. 2d at 765 & n. 2. Recently, however, we observed that in many contexts disqualification motions present purely legal issues, subject to full appellate review. *American Roller Co. v. Budinger*, *supra*, 513 F. 2d at 985 n. 3. Once again, this possible discrepancy need not detain us here. As previously rehearsed, pages 3-4 *supra*, in this case the district court treated the motion to disqualify counsel as a motion to reconsider the class action certification decision. The issue on certifying plaintiffs as class representatives—whether they would “fairly and adequately protect the interests of the class”, F. R. Civ. P. 23(a)(4), when their counsel was an employee (and later a partner) in Kramer's firm—was related, but not identical, to the issue posed by the disqualification motion. Reducing the distinction to its bare essentials, the former issue relates to who may serve as class representative, while the latter relates to who may serve as counsel. The trial court failed to perceive the difference and consequently erred.

III.

We take as our starting point Lord Herschell's remark to Sir George Jessel: “[I]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting

it.”³ From this has emerged what may be described as an axiomatic norm, if not a legal doctrine or conception,⁴ *viz.*, that the appearance of conduct associated with institutions of the law be as important as the conduct itself. Indeed, this notion is at least an implicit predicate of the Code of Professional Responsibility,⁵ drafted by the American Bar Association and implemented by the courts, including the United States District Court for the Eastern District of Pennsylvania,⁶ to govern behavior of attorneys. The importance of this notion cannot be gainsaid. Canon 9 of the Code of Professional Responsibility, which Local Rule 11 in the district court made applicable to counsel, declares: “A lawyer should avoid even the appearance of professional impropriety.” Canon 9 is case law in this court: “[A] court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance

3. 2 J. B. ATLAY VICTORIAN CHANCELLORS 460 (1908).

4. See Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 484-85 (1933).

5. The Preamble to the Code of Professional Responsibility states in part: “[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.”

The Code of Judicial Conduct—which the ABA adopted in 1972 and which the Judicial Conference of the United States promulgated at its April 1973 meeting to govern the conduct of federal judges—is to similar effect. Canon 2 of the judicial conduct code states: “A Judge should avoid impropriety and the appearance of impropriety in all his activities.” The Commentary elaborates: “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. . . . [A judge] must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.” 69 F. R. D. 273, 274 (1976).

6. Local Rule 11 provides that the ABA's ethical guidelines “shall become standards of conduct for attorneys of this Court.” See *Kroungold v. Triester*, *supra*, 521 F. 2d at 765 n. 3.

of impropriety." *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385-86 & n. 12 (3d Cir. 1972), *cert. denied*, 411 U. S. 986 (1973).

These considerations form the backdrop to our approach in this appeal. Thus, we are not concerned with (a) factual determinations whether Kramer was the de facto attorney in these proceedings or whether it was variously Britton or Kapustin; or (b) the quality of the professional services rendered by counsel on behalf of the plaintiff class; or (c) the motivations of Kramer as a plaintiff, as a class representative, or as an attorney-employer or attorney-partner of the attorney who formally appeared for the plaintiffs. In the view we take, we may assume that Kramer is not and was never the attorney in fact, that the professional representation rendered variously by Britton and Kapustin is of the highest caliber, and that Kramer's interest in these proceedings is limited to his role as a named plaintiff and member of the class. With these assumptions we proceed.

IV.

In the federal courts, the right of parties to "plead and conduct their own cases"⁷ has been protected by statute since the beginning of our nation. *Faretta v. California*, 422 U. S. 806, 812 (1975). Indeed, in the criminal context, one has a constitutional right to represent himself. *Ibid.* at 836. Thus, we take it as settled that any plaintiff *qua* plaintiff—including Kramer—were he not also a class representative—may represent himself *pro se*.

Appellees do not appear to contest seriously that, in the circumstances of this case, it would have been improper for Kramer, the class representative, to designate himself as counsel for the class. In his deposition, Kramer stated

7. 28 U. S. C. § 1654.

that he would not accept any portion of a court-awarded attorney's fee derived from this case "[b]ecause I thought that as a plaintiff in the purported class action case I could not benefit from the case other than as a member of the class, and could not benefit differently from other members of the class." App. at 77a. We agree.

The very nature of this litigation—a Rule 23(b)(3) class action for money damages—suggests the possibility that success, either by verdict and judgment or by settlement, would result also in a court-awarded attorneys' fee from the fund created for the benefit of the class. Federal courts have long recognized "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 257 (1975); *see, e.g., Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939). *See generally* 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1803 (1972); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).⁸ We have subscribed to these general views. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973); *see SEC v. Aberdeen Securities Co.*, 526 F.2d 603, 607 (3d Cir. 1975).

Thus, Kramer acted wisely in the position articulated in deposition. Clearly he perceived that he could be accused of a conflict of interest were he to anticipate a share

8. Dawson summarized the theory thusly: "[A] benefit to the fund is supposedly required. . . . The standard formula [of benefit] . . . mix[es] together three distinct ideas: that a fund can be benefited by being 'created, increased or protected'" 87 HARV. L. REV. at 1626.

of the potential court-awarded attorneys' fee in addition to his recovery as a member of the class.

Appellee Kramer also demonstrated an awareness of fealty to the spirit of Canon 9 of the Code of Professional Responsibility: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Given the possible conflict of interest⁹ between the class member plaintiff *qua* plaintiff and the class member plaintiff *qua* counsel, under circumstances in which an equitable fund may be created from which an attorneys' fee may be awarded,¹⁰ we agree that a plaintiff class representative could not, with complete fidelity to Canon 9, serve as class counsel.

Appellees argue that *Kohn v. American Metal Climax, Inc.*, 458 F. 2d 255 (3d Cir.), *cert. denied*, 409 U. S. 874 (1972), and *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir.), *cert. denied*, 398 U. S. 950 (1970), can be read as holding to the contrary. We disagree. The challenge raised in this appeal, *see* pages 5-6 *supra*, was not presented to the court in those cases. Thus it cannot be said that we have considered, adjudicated and set forth a holding regarding the duality problem.^{10a}

9. Ethical rules emanating from Canon 5 may also indicate a conflict. See especially DR 5-101 and DR 5-102. DR 5-101(B) provides, in part, that "[a] lawyer shall not [with certain exceptions] accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness"

10. There might be cases, appropriate to class action treatment, where success would not result in a beneficial fund for the class. *See* F. R. Civ. P. 23(b)(2). In such circumstances, the conflict of interest impediments to an attorney-plaintiff class representative also serving as counsel might not be present. We do not decide the rule that should obtain in such circumstances.

10a. "A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given." H. BLACK, *LAW OF JUDICIAL PRECEDENTS* 37 (1912).

Having concluded that the attorney-plaintiff class representative may not also serve as counsel for the class in cases such as this, we must now consider the effect of Canon 9 on the situation in which the partner (or employee) of the attorney class representative is chosen as counsel.

V.

Historically, members of this nation's bar both have formed cutting edges and have wielded shields in zealous efforts to vindicate and protect interests of all kinds—individual, public, and social; economic, political, cultural, and personal. As private attorneys general and frequently in class action contexts, they have guided litigation insisting that legislative mandates be obeyed, administrative regulations respected, and constitutional guarantees observed. Often their intense advocacy has generated controversy in both the private and public sectors. Often issues they probe are sensitive, provocative and disputatious. Recently, however, critics have challenged the altruism of some class action lawyers and charged that the paramount motivation for such litigation was counsel's desire to generate substantial fees. The cynic's argument may have a certain validity. But that validity need not serve as the basis for our every rule; nor does it detract from, nor should we lose sight of, the fundamental laudatory purposes of the class action device:

Its historical purpose was to alleviate the burden on the court and its facilities in cases where a claim was common to a large number of persons. . . . Its use in claims for damages is justified where the public policy considerations of efficient court administration outweigh the potential prejudice to persons in interest who are not parties to the proceedings, but who may

nevertheless become legally bound by an adjudication as if they were in fact parties litigant.

Also influencing the general acceptance of class actions has been recognition of the fact that the collective or accumulative technique of this device makes possible an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons, were it not for the joinder procedure. The 1966 amendments to Rule 23 are a restatement and reinforcement of public policy, mutually expressed by the Judicial Conference of the United States, its advisory committee on Rules of Civil Procedure, the Supreme Court, and the Congress, which candidly facilitate and encourage the use of class actions.

Greenfield v. Villager Industries, Inc., 483 F. 2d 824, 831 (3d Cir. 1973) (footnote omitted).

Thus, a class action is a special type of legal proceeding. Our inquiry becomes necessary only because an attorney's fee may emanate from an equitable fund, creating a possible conflict between the interests of the plaintiff class members represented by Kramer and the interest of Kramer's partner Kapustin¹¹ in maximizing his award as attorney for the class.

Appellees suggest that, in this case, there are adequate safeguards against professional impropriety: "(1) Both plaintiffs have stated that they receive no portion of any attorney's fee that is awarded in this case; (2) No close association exists between plaintiff Harrison and the counsel to the class as they have never been professionally associated; (3) Both plaintiffs, although attorneys, have

11. Presumably, Britton, Kramer's former employee, might also petition for an award from the fund. See App. at 190a.

stated that their role in this litigation is limited to that of a party plaintiff." Appellees' Brief at 23.¹²

Whatever effectiveness such disclaimers might have in defending against an accusation of professional impropriety lodged against Kramer or Harrison, they do not meet the criticism that retention of Britton and later Kapustin contravened the appearance of propriety. And it is the *appearance*, not the *fact*, of impropriety which Canon 9 is designed to eliminate.

As Ethical Consideration 9-2 of the Code of Professional Responsibility cautions in part, "[o]n occasion, ethical conduct of a lawyer may appear to laymen to be unethical." Laymen generally understand basic partnership attributes. The word "partner" has a meaning among the laity¹³ that does not vary substantially from its jurisprudential ramifications.¹⁴ Implicit in the term is a sharing

12. A fair reading of Harrison's deposition testimony reveals that his interest in these proceedings is that of a class member, *i.e.*, to recover as a joint owner any damages relating to the stock in Scientific Control he held with Kramer. Kramer asked him to be a plaintiff and designated counsel for them. Harrison said that at no time had he discussed with Kramer or Kapustin any compensation for Kapustin. "I left it completely in Mr. Kramer's hands, basically for personal reasons," he said. App. at 101a. By comparison, Kramer testified that his interest in the litigation was so keen that he, as class representative, would advance the costs, even if they amounted to \$100,000 or \$150,000. *Ibid.* at 79a.

13. "Partner" is defined by Webster's as "a person who takes part in some activity in common with another or others; associate; [*e.g.*,] a) one of two or more persons engaged in the same business enterprise and sharing its profits and risks" WEBSTER'S NEW WORLD DICTIONARY 1036 (2d college ed. 1970).

14. Black's defines "partner" as "[a] member of copartnership or firm; one who has united with others to form a partnership in business." Partnership is defined as:

A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them.

of profits and losses. Esoteric internal protections in writing or under oath, insulating the plaintiff-attorney partner from participating in a fee, can hardly dissipate the lay notion that action by one partner is action for the partnership. Accordingly, we cannot agree that an appearance of an improper conflict of interest inherent in one partner's dual role as class representative and as class counsel vanishes when his partner is substituted as class counsel. To argue as appellees do is to argue against reality, against the vagaries of human nature, and against widely-held public impressions of the legal profession. Thus, if one concludes, as we do, that an appearance of impropriety, at a minimum, ensues when an attorney class representative also serves as counsel for a class that may benefit from an equitable fund, substituting a partner as counsel will not suffice as an antidote. If we are to provide force and vigor to Canon 9, a prophylactic rule prohibiting appointment of a partner as counsel is mandated in such circumstances. What we have said concerning substitution of a partner of the attorney-class representative applies equally to substitution of an attorney-employee or office associate as counsel.

Finally, appellees argue that disqualification of Kapustin at this late date would deprive the class of the familiarity with the case he developed during its pendency. Subsumed in this argument is the contention that appel-

14. (Cont'd.)

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry, furnished in determined proportions by the parties.

Partnership is where two or more persons agree to carry on any business or adventure together, upon the terms of mutual participation in its profits and losses.

BLACK'S LAW DICTIONARY 1330-31 (3d ed. 1933) (citations omitted).

lant dallied unnecessarily in presenting its disqualification motion to the district court. On this record, we are unpersuaded by either claim.¹⁵ The motion to disqualify was filed within two months of the denial of reconsideration of the class action certification decision. Defendants certainly could not be faulted for litigating the class certification first. Had they won on that score, the action might have gone forward as an individual action, in which case the disqualification issue might never have surfaced. See pages 7-8 *supra*. Concomitantly, we cannot accept the proposition that disqualifying Kapustin now will work an undue hardship on the class. The district court, which has supervised the progress of this case—slow though it may have been—, has stated that “[t]he issue of liability is not complex and should not consume too much trial time.” 67 F. R. D. 98, 102 (denying motion to reconsider class certification). That being so, it follows logically that it should not require new counsel an inordinate amount of time to become sufficiently familiar with the case to proceed to trial.

15. Ethical Consideration 9-2 instructs: “When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” (footnote omitted). The conclusion we reach today will govern similar actions in the future; it will not affect litigations already concluded. We recognize that there may now be pending class actions in which counsel arguably ought to be disqualified under the rule we announce today. Further, we recognize that in such pending actions an argument might be made, in extraordinary circumstances, that “explicit ethical guidance [did] not exist” heretofore and that invocation of the rule announced herein would not “promot[e] public confidence in the integrity and efficiency of the legal system and the legal profession.” We should not and do not decide how such a hypothetical case would be decided. Resolution of the issue must await an actual case or controversy, which should be decided in the first instance by the district court with the benefit of full briefing from counsel.

VI.

As we have observed previously in a constitutional context, "although the right to counsel is absolute, there is no absolute right to a particular counsel." *United States ex rel. Carey v. Rundle*, 409 F. 2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U. S. 946 (1970). We have concluded that vindication of the Code of Professional Responsibility requires the following rule: no member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee award would be appropriate.

The appeal at No. 75-1673 will be dismissed for want of jurisdiction. In the appeal at No. 75-1849, the order of the district court denying the motion for disqualification of appellees' counsel will be reversed and the proceedings remanded.

ROSENN, *Circuit Judge*, Concurring

I join fully in the court's opinion and disposition of the case. I write to make several additional points.

First, and most importantly, I understand the court to hold only that an attorney cannot act as counsel to a class when (a) the action might result in the creation of a fund from which an attorney's fee may be awarded, and (b) the named class representative is also the class counsel or an attorney professionally associated with the attorney seeking to act as class counsel. I thus do not understand the court's rule to bar an attorney from bringing a class

action as plaintiff and acting as the named class representative so long as class counsel is an attorney not professionally associated with the plaintiff attorney. Furthermore, I do not understand the opinion to bar an attorney from acting as counsel to a class of which he might be a member, or to a class with claims similar or identical to claims in which the attorney has a beneficial interest.

Some examples may serve to clarify my point. If a client seeks the advice of an attorney with respect to possible fraudulent dealings in the shares of a corporation in which the attorney is also a shareholder and if an action to recover losses due to those fraudulent dealings would assert a claim the attorney could also assert as a shareholder, I see no reason to require the attorney to decline representing the class of persons with like claims, or to decline membership in the class for him or herself. Similarly, if the attorney's spouse or the law firm in which the attorney is a partner owned the stock, I think the attorney need not decline the representation of the class. Also, if an attorney's corporate client, in which the attorney owns stock, brought an antitrust class action on behalf of it and other corporations, I do not think the attorney need decline representing the class.

I think these situations are distinguishable from the facts of the instant case primarily because there is no appearance of financial conflict of interest and no appearance of improper solicitation—i.e., that the attorney-plaintiff and class counsel collusively use the class action mechanism to acquire clients.¹ Furthermore, to the extent the named class representative has substantive duties to perform—

1. I do not mean to suggest, nor do I understand the panel's opinion to suggest, that we are concerned only with the appearances, rather than the reality, of improper solicitation. I assume that if and when the latter does occur, it can be adequately dealt with through normal bar disciplinary procedures.

such as monitoring the performance of class counsel or agreeing to a settlement—the fact that the representative and counsel are somewhat independent insures that the representative will exercise unconstrained judgment.

Secondly, it is inevitable that this decision will pose some problem for district courts that have already certified classes in which the named representative and class counsel are professionally affiliated. It is my view that in such already ongoing cases automatic disqualification of counsel on defendant's motion is not mandated by this decision. Where it is possible for the class to obtain substitute counsel without substantially prejudicing the interests of the class or substantially delaying the action, the district court should disqualify counsel. There may be cases that have progressed so far and are so complex that requiring substitution of counsel would substantially delay the termination of the litigation and substantially harm the interests of the class members. In such instances, the district court may allow the litigation to proceed to termination without change in representative or counsel. The choice, in my view, lies in the informed discretion of the district court.

Finally, although I join the court's judgment on the jurisdictional issues, I continue to adhere to the views I expressed in my dissent in *Hackett v. General Host Corporation*, 455 F. 2d 618, 626 (3d Cir. 1972), *cert. denied*, 407 U. S. 925 (1972). There I argued that denial of class certification is an appealable order because, first, it qualifies as a collateral order under the doctrine of *Cohen v. Beneficial Finance Co.*, 337 U. S. 541 (1949), and second, it effectively terminates much class action litigation and thus is, in every meaningful sense, a final order. On the other hand, a class certification order does not terminate litigation, nor, in my view, does it ordinarily create the

kind of prejudice necessary to invoke the collateral order doctrine.²

2. The prejudice necessary to establish jurisdiction under the collateral order doctrine is that rights may be irreparably lost without review. *Hackett, supra*, 455 F. 2d at 627 (Rosenn, J., dissenting); *Samuel v. University of Pittsburgh*, 506 F. 2d 355, 359 (3d Cir. 1974). See, e.g., *Eisen v. Carlisle and Jacquelin*, 417 U. S. 156, 169-72 (1974), where the lack of appellate review of the district court's order requiring defendants to pay 90% of the costs of notice to class members would have irreparably foreclosed defendants from contesting that order. The prejudice resulting from merely having to continue to defend the suit is, in my view, usually insufficient to invoke appellate jurisdiction. But see *Herbst v. International Telephone and Telegraph Corp.*, 495 F. 2d 1308 (2d Cir. 1974).

APPENDIX B.

—
 IN THE
 UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF PENNSYLVANIA
 —

CIVIL ACTION No. 71-1954.
 —

MITCHELL A. KRAMER

and

DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP., et al.

—
 Memorandum Opinion.

BECHTLE, J.

October 1, 1974.

Plaintiffs, two Philadelphia lawyers, brought this action on August 9, 1971, alleging that they purchased 50 shares of Scientific Control Corp. on January 6, 1969, and that less than 30 days later sold them at a loss of over \$400. They also aver in the twice-amended complaint that the stock was initially offered for sale pursuant to a prospectus dated October 31, 1968, and that during the period October 31, 1969, through November 21, 1969, Scientific Control Corp. issued various financial reports. They claim that those reports, as well as the prospectus, contain material false statements and omissions. No one has sought to intervene in the action as a party plaintiff. As far as we know, no similar action has been brought against any one or more of the defendants.

Plaintiffs have filed a motion pursuant to Fed. R. Civ. P. 23(c)(1) for a determination that this case may proceed as a class action. In their motion, now before us, they ask that they be determined to be class action representatives of all persons except defendants who purchased stock of Scientific Control Corp. "pursuant to or in reliance on" the prospectus and all other written and oral communications regarding the corporation's financial condition from the date of the initial offering to November 21, 1969. Defendants do not dispute that there were other purchasers of the stock during that period and that they are too numerous to be joined conveniently in this action.

Defendants opposing the motion impugn the motives of plaintiffs in buying and selling the stock and then bringing this action. They claim that plaintiffs brought the action not to recover the \$400 loss but to profit from court-awarded counsel fees in a class action. Therefore, they maintain that the prerequisites of Rule 23(a)(4) are not met.¹

Assuming the impropriety of plaintiffs' motives in instituting the action, we do not believe the unnamed members of the proposed class should be penalized for that reason. From our observation of the manner in which plaintiffs have proceeded with this action up to this juncture, we conclude that they will fairly and adequately protect the interests of the class.² This action may proceed as a Rule 23(b)(3) class action.

1. Subdivision (4) of Rule 23(a) provides: "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

2. Plaintiffs need not have a large damage claim in order to represent the class. The size of their claim is not dispositive of whether they will adequately represent the class. *Eisen v. Carlisle & Jacquelin*, (Eisen II) 391 F. 2d 555, 563 (2nd Cir. 1968); 7 *Wright & Miller*, Fed. Pract. & Proc. § 1767.

The decision to allow this case to so proceed does not mean that the opportunity to raise the question of improper motive has been foreclosed in this case. Defendants' objection to the class action based on that issue is more properly addressed to the amount, if any, of plaintiffs' right to recover damages (*Rochez Bros., Inc. v. Rhoades*, 491 F. 2d 402, 410 (3rd Cir. 1973)) and to be awarded attorneys' fees.

Plaintiffs' motion will be allowed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—
Civil Action No. 71-1954.
—

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP., et al

—
Memorandum Opinion.

BECHTLE, J.

October , 1974

AND NOW, TO WIT, this 1st day of October, 1974, It Is ORDERED that plaintiffs' motion for a determination that this action may proceed as a Rule 23(b)(3) class action and that plaintiffs be determined to be representatives of the class is *granted*.

LOUIS C. BECHTLE, J.

APPENDIX C.

—
 IN THE
 UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF PENNSYLVANIA
 —

Civil Action No. 71-1954.
 —

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP.; and ARTHUR ANDERSON & CO.; and H. L. FEDERMAN & CO.; and KLEINER, BELL AND CO., INC.; and JOHN B. BAIRD; and DONALD G. O'NEAL; and L. T. RATNER; and NORMAN C. YOUNG; and CLYDE WILLIAMS; and VAN CALVIN ELLIS; and H. L. FEDERMAN; and PATRICK S. MARTIN; and WILLIAM C. WEATHERFORD; and ERNEST E. SPECKS; and HENRY W. HOOKER; and MERRILL J. WHISTON; and ARTHUR E. SPECKHARD; and WILLIAM S. LEE and JOSEPH T. JONES.

—
 Memorandum and Order.

BECHTLE, J.

April 17, 1975

This Court permitted this case to proceed as a class action on October 1, 1974, after delaying that decision until after it had ruled on defendants' various motions to dismiss.¹ Defendants now ask this Court to revoke that

1. See, 365 F. Supp. 780 (1973).

Order. For reasons hereinafter stated, we will deny their motion for reconsideration.

While a class action determination is never irrevocable, *Seligson v. Plum Tree, Inc.*, 61 F. R. D. 343 (E. D. Pa. 1973), the proponents of revocation or modification of a class action Order should, at minimum, show some newly discovered facts or law in support of their desired action. Defendants have not met that minimum. The grounds they list now include those which they gave previously or could have asserted earlier but did not. It seems that the two named plaintiffs are incapable of acting as class representatives.

Plaintiffs are members of the law firm which employs the lawyer who represents them. Defendants' main ground is that a conflict of interest between plaintiffs and the class they represent is inherent in their being represented by their own law firm.² In the case of *Umbriae, et al v. American Snacks, Inc.*, (E. D. Pa. C. A. No. 74-549, decided January 27, 1975), plaintiffs sought to represent a class of debenture holders who purchased the securities after relying upon a misleading prospectus. One of the named plaintiffs was a partner of the law firm representing the plaintiffs. The case was transferred from this District to the United States District Court for the District of Massachusetts under 28 U. S. C. § 1404(a). Nevertheless, Judge Higginbotham, as the transferor Judge, fortunately expressed his opinion on how he would have resolved the attorney-representation conflict issue, if the matter were not transferred, as follows (Slip Opinion, pp. 16-17):

"Touche Ross contends that a conflict of interest exists between the representative parties and the class be-

2. This was the principal ground pressed by defendants in originally opposing the class action motion.

cause the named plaintiffs, Cletus Lyman, Esquire, is an attorney and partner with counsel for plaintiffs, Richard A. Ash, Esquire, in the law firm of Lyman & Ash. The remaining named plaintiffs, defendants claim, are 'siblings' of Cletus Lyman. It is in the nature of the motion practice on class determination issues that defendants, who naturally have no interest in the successful prosecution of the class suit against them, are called upon to interpose arguments in opposition to class determination motions verbally grounded upon a concern for the 'best' representation for the class while the implicit, but nonetheless real, objective of their vigorous legal assaults is to insure 'no' representation for the class. Of course I must assess defendants' argument upon its intrinsic merit, but on this issue it is my judgment that Lyman's status as an attorney, his business relationship with counsel for plaintiffs, and his family relationship with the other named plaintiffs do not create interests which are adverse to those of the class, and thus neither the named plaintiffs nor counsel for plaintiffs should be disqualified from class representation. Although Cletus Lyman may benefit through his partnership in the law firm of Lyman & Ash from an award of legal fees, if plaintiffs are successful in the present litigation, this interest does not in my opinion create substantially more of a risk that the suit would be compromised unfairly as respects class interests than would exist if there were no relationship between the representative parties and counsel for plaintiffs. The vision of substantial counsel fees might cloud the judgment of counsel for plaintiffs and the representative parties but the court does not in granting a motion for class determination entrust to the representative

parties ultimate responsibility for determining the fairness to the class of settlement decisions which compromise class interests. Any compromise or dismissal of a class action must be approved by the court and notice of the proposed compromise or dismissal must be given to all class members; judicial approval should be granted only after the court determines that the compromise is in the interest of the entire class. Fed. R. Civ. P. 23(e).¹⁰ *Euresti v. Stenner*, 458 F. 2d 1115 (10th Cir. 1972). In my estimation the safeguard provided in Rule 23(e) against litigation compromises unfair to the class as a whole are adequate to insure protection of class interest under the representation of these named plaintiffs and counsel. *Kramer v. Scientific Control Corp.*, 365 F. Supp. 780 (E. D. Pa. 1973) (See also Slip Opinion of October 1, 1974).

Blumberg, et al. v. Barrett (E. D. Pa., C. A. No. 73-237, decided December 27, 1974), is not to the contrary. In that case, this Court found there was a conflict created by having Malcolm Blumberg, Esquire, as one of the named plaintiffs. This was not just because he was a member of the law firm representing plaintiffs, but for the reason that the law firm was a close friend and business associate of another named plaintiff, William Richman, whose interest clashed with those of the absent class members. In fact, the plaintiffs should have sued Richman but omitted to do so.

¹⁰ Fed. R. Civ. P. 23(e) reads:

'Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.'

Moreover, Rule 23(d)³ allows some latitude for the District Court to take appropriate action to guard against any conflicts of interest which would crop up in the course of the action. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727, 737 (3rd Cir. 1970).

Plaintiffs purchased their shares of Scientific stock from the brokerage firm of Merrill, Lynch, Pierce, Fenner and Smith, Incorporated ("Merrill Lynch"). A number of former shareholders of Scientific commenced actions in the United States District Courts against Merrill Lynch for the role it played in selling stock to the public. One of the actions was brought in the Northern District of Texas, another in the Southern District of New York. Defendants contend that the failure of plaintiffs to name Merrill Lynch, a former client of theirs, as a defendant in this action disqualifies them from representing the class. That plaintiffs chose not to sue Merrill Lynch for reasons other than the fact that they had previously represented that firm is supported by the record.

The most important one is that there is no proof that the brokerage firm recommended that plaintiffs make the purchases. Second, the actions against Merrill Lynch are based on that firm's alleged misrepresentations and omissions of material facts in its written and oral statements. In an action brought against the brokerage firm in the Northern District of Texas, the Fifth District has ruled that the case was not appropriate for class action treatment because of the nonstandardized form of the alleged misrepresentations. *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F. 2d 880 (1973). The District Court for

3. Rule 23(d)(2) provides in part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members to signify whether they consider the representation fair and adequate . . ."

the Southern District of New York held the class action motion in the case before it in abeyance to permit the plaintiffs in the case to submit additional evidence regarding the sale of stock by the brokerage firm. *Mascolo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 61 F. R. D. 481 (1973). So, even if Merrill Lynch had suggested to plaintiffs that Scientific stock would be a good investment, a class action against that firm would be ill-advised. Finally, there has been no showing that Mitchell Kramer's prior representation of Merrill Lynch will prevent plaintiffs from adequately representing the class here.

Another ground offered by defendants supporting their contention that plaintiffs should be disqualified from representing the class is that the latter have demonstrated their inability adequately to protect the interest of the class by their failure to take steps to ascertain the identity of, or give notice of this action to, members of the class. There has been undue delay. Scientific, one of the defendants, is not without contributing fault. In cases of this type, the identity of each member of the class is usually learned from one of the defendants' records or its stock transfer agent. If defendants were really concerned about the interest of the class, they could have offered information to plaintiffs which would have facilitated an earlier ascertainment of the class composition. The excuse given by Scientific for not cooperating is that it is no longer doing business. However, its transfer agent, Republic National Bank of Dallas, Texas, is still functioning. Though Scientific informed plaintiffs that it did not have the stock transfer list, neither that corporation nor the bank told them that the transfer records are stored in Dallas, Texas, under a court order in the case of *Reilly v. Merrill Lynch* (C. A. 3-6130E), a case originating in the Northern District of Texas and later transferred to the Southern District of New York, where it was consolidated with *Mascolo v.*

Merrill Lynch. Plaintiffs' counsel did not learn of the impoundment until recently. Plaintiffs have advised the Court that they will microfilm those lists now that they have been permitted to do so by the District Court for the Southern District of New York.⁴ They have also advised the Court that if the transfer records do not contain sufficient information for them to provide individual notice, they are prepared to notify the class by publication, which would be "the best notice practicable under the circumstances" as required by Fed. R. Civ. P. 23(c)(2).

Under the heading that plaintiffs' claims are not typical of those of the class they represent because allegedly they have suffered no damages under § 11(e) of the Securities Act of 1933, 15 U. S. C. § 77k(e), defendants are attempting to have this Court reconsider its ruling on their motion to dismiss the second amended complaint. Plaintiffs bought their 50 shares, not when the stock was originally offered to the public but in the market or over-the-counter transaction from Merrill Lynch. They sold the shares in the market one month later at a loss. Both the purchase and sale occurred before the filing of the original complaint in this action. Subsection (3) of § 11 places a limit on the amount recoverable in this type of action. Defendants would have us read the words "(not exceeding the price at which the security was offered to the public)" appearing twice in subsection (3) as though it meant only the price at which the security was listed by the issuer in the original offering to the public rather than the price when plaintiffs later bought the stock in the open market. Defendants have cited no authority supporting their interpretation. We adhere to our former ruling.

4. By Order dated March 26, 1975, Judge Charles L. Brieant, Southern District of New York, has permitted the microfilming to take place and plaintiffs have advised that the stock transfer records of Scientific Control Corporation will be examined and copied this month in Dallas, Texas.

Because plaintiffs have alleged in their Second amended complaint that they relied on oral as well as written misrepresentations, defendants argue that common questions of fact and law do not exist for class action treatment. Plaintiffs do not deny that the oral statements may have varied as to each individual class member or group. However, the violation of the disclosure rule in the prospectus and other documents will be the same for the class. This common nucleus of statements satisfies the predominance of common questions requirement of Rule 23(b)(3). See, *Bisgeier v. Fotomat Corporation*, 62 F. R. D. 113 (N. D. Ill., 1972); *In re Memorex Security Cases*, 61 F. R. D. 88 (N. D. Cal. 1973); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc.*, 52 F. R. D. 335, 344-346 (D. Minn. 1971).

Finally, and in the alternative, defendants request that our Order of October 1, 1974, permitting this case to proceed as a class action be certified pursuant to 28 U. S. C. § 1292(b) so that an immediate appeal from that Order may be taken. As pointed out by Judge McGlynn in *Blumberg, et al. v. Barrett, et al, supra*, because of the binding effect of a judgment in a class action upon "those who are defined to be in the class and who after notice have not affirmatively sought to exclude themselves," the question of adequacy of representation of the class is not to be lightly regarded. This case has been on our dockets since August 9, 1971. Trial on the merits cannot take place until the class has been given an opportunity to respond after being notified under Rule 23(c)(2). The issue of liability is not complex and should not consume too much trial time. Plaintiffs who stand to lose the most if the class action determination is overturned on appeal are willing to proceed to trial. In my opinion, trial on the merits should not be further delayed. The motion will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1954.

MITCHELL A. KRAMER and DAVID C. HARRISON

v.

SCIENTIFIC CONTROL CORP., et al

Order.

AND NOW, TO WIT, this 17th day of April, 1975, It Is ORDERED that the motion of defendants for reconsideration of plaintiffs' motion for class action determination is *denied*.

IT IS FURTHER ORDERED that defendants' alternative motion for certification pursuant to 28 U. S. C. § 1292(b) is also *denied*.

LOUIS C. BECHTLE, J.